

624(i) mandates the Commission to establish rules for the disposition of "cable installed . . . within the premises of such subscriber."¹²¹ These commenters note that "premises" is not defined in the Communications Act and urge the Commission to define the term to encompass wiring that is solely dedicated to an individual dwelling unit. Such a definition, they argue, would further the goals of the 1992 Cable Act, which include fostering competition in the monopolistic cable marketplace.¹²²

b. Discussion

54. We believe that the Commission has authority under Sections 4(i) and 303(r) of the Communications Act to establish procedures for the disposition of MDU home run wiring upon termination of service. Section 4(i) permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."¹²³ The Commission may properly take action under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions. We propose to invoke Section 4(i) here because the law does not expressly prohibit the Commission from adopting procedures regarding the disposition of home run wiring and because affording the widest range of competitive opportunities is necessary to effectuate the purposes of the Communications Act.¹²⁴

55. Section 4(i) has been held to justify various Commission regulations that were not within explicit grants of authority.¹²⁵ In these cases, the courts found that the Commission's regulations were not

¹²¹Communications Act, § 624(i), 47 U.S.C. § 544(i) (emphasis added).

¹²²Bartholdi Reply Comments at 6-7 (citing 1992 Cable Act § (2)(a)(6), (b)(1-2); 1992 House Report at 118); see also AT&T Comments at 10-14; Compaq Comments at 44-50; Media Access Project/CFA Comments at 12.

¹²³Communications Act, § 4(i), 47 U.S.C. § 154(i).

¹²⁴See also Communications Act, § 303(r), 47 U.S.C. § 303(r) (Commission has authority to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . .").

¹²⁵See, e.g., *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1107-09 (D.C. Cir. 1987) (affirming an FCC order requiring telephone companies to refund charges they had collected in excess of the authorized rate of return, even though the Act's only provision explicitly authorizing refunds "does not apply to the circumstances of this case," because refunds were necessary to remedy the violation of the Commission's rate of return order); *North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292-93 (7th Cir. 1985) (affirming a Commission order pursuant to Section 4(i) requiring the Bell holding companies to file capitalization plans for subsidiary companies organized to sell telephone equipment, even though the Act conferred no authority on the Commission over holding companies (and the legislative history of the Act suggested that Congress had considered granting such authority but ultimately denied it) because such a requirement "was necessary and proper to the effectuation of" the Commission's functions; "Section 4(i) empowers the Commission to deal with the unforeseen - - even if that means straying a little way beyond the apparent boundaries of the Act -- to the extent necessary to regulate effectively those matters already within the boundaries."); *Lincoln Telephone Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981) (holding that Section 4(i) granted the Commission the authority to require a tariff filing by a telephone company that arguably qualified as a "connecting carrier," where the only provision in the Act expressly requiring carriers to file tariffs specifically exempted connecting carriers); *Nader v. FCC*, 520 F.2d 182,

inconsistent with the Communications Act because they did not contravene an express prohibition or requirement of the Act, and were reasonably "necessary and proper" for the execution of the agency's enumerated powers. Most recently, in *Mobile Communications Corp. v. FCC*,¹²⁶ the United States Court of Appeals for the District of Columbia Circuit acknowledged the Commission's authority under Section 4(i) to regulate even where the Communications Act does not explicitly authorize such action. In that case, the D.C. Circuit held that the Commission had authority under 4(i) to require Mtel, which held a pioneer's preference, to pay for a narrowband personal communications service ("PCS") license, despite the fact that the Act did not specifically authorize the Commission to charge a price for a license granted to a pioneer's preference holder.¹²⁷ The court denied Mtel's argument that the Commission's action was inconsistent with the Communications Act and therefore not within the Commission's Section 4(i) power. Mtel argued that Congress' explicit grant of authority to the Commission to collect certain fees and to conduct auctions for specified types of licenses denied the Commission authority to impose other fees.¹²⁸ The court found Mtel's reliance on the *expressio unius maxim* -- that the expression of one is the exclusion of other -- misplaced. According to the court, "[t]he maxim 'has little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has 'directly spoken to the precise question at issue.'"¹²⁹ The court also denied Mtel's argument that, in the absence of an affirmative statutory mandate to support the payment requirement, the Commission's action was not "necessary in the execution of [the Commission's] functions," as required by Section 4(i).¹³⁰

204 (D.C. Cir. 1975) (holding that an FCC order prescribing a rate of return for AT&T allowed the public to receive the benefit of the protection inherent in the Commission's authorization to prescribe just and reasonable charges, and therefore "was in the public interest, necessary for the Commission to carry out its functions in an expeditious manner, and within its section 4(i) authority" even though the Act makes no mention of any authority to prescribe a rate of return); see also *Southwestern Cable Co.*, 392 U.S. 157, 180 n.46 (1968) (recognizing Section 4(i) as basis for Commission's authority to regulate CATV).

¹²⁶77 F.3d 1399 (D.C. Cir. 1996) ("*Mtel*"), cert. denied, 117 S. Ct. 81 (1996).

¹²⁷The Commission granted Mtel a pioneer's preference in 1993. Later that year Congress amended the Communications Act to allow the Commission to use auctions for allocation of some kinds of licenses (including PCS licenses) when "mutually exclusive applications are accepted for filing." See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Section 6002 (codified at 47 U.S.C. § 309(j)). The Commission subsequently reversed its decision that Mtel would not have to pay for its license, in part, because of the Commission's "clearer understanding of the interdependence of the nationwide narrowband PCS licenses and the potential anticompetitive effects that the free award of one of these licenses may have on the PCS market as well as the auction process." *In Re Application of Nationwide Wireless Network Corp.*, 9 FCC Rcd 3635, 3640 (1994).

¹²⁸*Mtel*, 77 F.3d at 1404.

¹²⁹*Mtel*, 77 F.3d at 1404-05 (citing *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron v. NRDC*, 467 U.S. 837 (1984))).

¹³⁰The Commission had argued that in imposing the payment requirement it relied on its duty to determine "whether the public interest, convenience, and necessity will be served" by the granting of a license application as required by Section 309(a). The court found that "in light of that requirement, the payment condition would be 'necessary in the execution of [the Commission's] functions' under Section 4(i) so long as the Commission properly found it necessary to 'ensure the achievement of the Commission's statutory responsibility' to grant a license only where the grant would serve the public interest, convenience, and necessity." *Mtel*, 77 F.3d at 1406 (citations omitted). The court found that the concerns alluded to by the Commission in its Licensing Decision, specifically

56. Applying these principles here, we conclude that the Commission is authorized under Section 4(i) to establish procedures regarding the disposition of MDU home run wiring upon termination of service. First, establishing rules regarding the disposition of the home run wiring upon termination is necessary to the execution of the Commission's functions. As noted above, Section 624(i) directs the Commission to prescribe rules regarding the disposition of wiring within a subscriber's premises in order to promote consumer choice and competition by permitting subscribers to avoid the disruption of having their home wiring removed upon voluntary termination and to subsequently utilize that wiring for an alternative service. We believe that, under our current rules, we cannot fully meet those objectives in the MDU context because, as described above, MDU owners often will not permit multiple home run wires to be installed in their buildings. In order to promote consumer choice and competition, we therefore propose to prescribe additional rules regarding the disposition of the existing home run wiring upon termination of service.

57. Further, we propose to premise our decision to establish procedures regarding the disposition of home run wiring in MDUs on the Communications Act's fundamental purpose of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service . . ." ¹³¹ Moreover, we propose to premise our decision on the pervasive regulatory structure Congress established regarding cable communications, the goal of which is to replicate or encourage competitive conditions. Section 601 of the Communications Act states that one of the purposes of Title VI is to promote competition in cable communications. ¹³² Due to the lack of competitive alternatives in multichannel video programming services, ¹³³ Congress has authorized the Commission to ensure that basic cable services, including equipment, are available at reasonable rates, ¹³⁴ to ensure that cable programming service rates are not unreasonable, ¹³⁵ and to establish standards whereby cable operators fulfill customer service requirements. ¹³⁶

58. We believe that establishing procedures regarding the disposition of MDU home run wiring will assist the Commission in discharging its statutory obligations under Section 623(b) and its overall responsibility to pursue Congress' preference for competition stated in the 1992 Cable Act. ¹³⁷ Section 623(b) of the Communications Act requires the Commission to prescribe rules to ensure that rates

"the unjust enrichment of Mtel from a free license while, under the new auction regime, others would be required to pay," or "the prospect of predation by Mtel," "would support a finding that the payment requirement is 'necessary in the execution of [the Commission's] functions.'" *Id.*

¹³¹Communications Act, § 1, 47 U.S.C. § 151.

¹³²Communications Act, § 601(6), 47 U.S.C. § 521(6).

¹³³*See, e.g.*, S.12, 102d Cong., 2d Sess. at 8-20 (1992).

¹³⁴Communications Act, § 623(b), 47 U.S.C. § 543(b).

¹³⁵Communications Act, § 623(c), 47 U.S.C. § 543(c).

¹³⁶Communications Act, § 632(b), 47 U.S.C. § 552(b).

¹³⁷Communications Act, § 623(a), 47 U.S.C. § 543(a).

for basic cable service are "reasonable" and that such regulations "shall include standards to establish, on the basis of actual cost, the price or rate for . . . installation and lease of equipment used by subscribers" ¹³⁸ The regulations authorized by Section 623(b) cover "equipment used by subscribers to receive the basic cable service tier, including . . . equipment as is required to access programming" ¹³⁹ The term "equipment" under Section 623(b) includes cable inside wiring. ¹⁴⁰ This extensive authority seeks to foster enhanced services to the subscriber at reasonable prices.

59. We believe that establishing the above procedures regarding the disposition of MDU home run wiring is necessary to fulfill Section 623(b)'s mandate of reasonable basic cable rates. We believe that these procedures will provide advance certainty for property owners, alternative video service providers and subscribers regarding the disposition of the home run wiring when the existing service is terminated, thereby alleviating current circumstances that deter the property owner from considering alternative service providers and fostering competition among service providers. We believe that such competitive choice will exert a restraining influence on rates as service providers compete for the opportunity to serve the entire building or individual subscribers.

60. Moreover, in the 1992 Cable Act, Congress specifically embraced a "[p]reference for competition" over regulation in setting rates for cable services. ¹⁴¹ Fostering competition among service providers through the adoption of rules regarding the disposition of MDU home run wiring is a fundamental means to ensure that cable service rates remain "reasonable." The legislative history of Section 623(b) states that Congress agreed that "[r]ather than requiring the Commission to adopt a formula to establish the price for equipment, the Commission is given the authority to choose the best method of accomplishing the goals of this legislation." ¹⁴² We therefore find that it is within our scope of authority under the 1992 Cable Act to establish procedural mechanisms that encourage reasonable rates through a competitive environment rather than a regulatory one.

61. Finally, we believe that our proposed approach would help to fulfill Congress' mandate in the 1996 Act to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans." ¹⁴³ We believe that adoption of the above procedural mechanisms would enhance competition, fostering the deployment of innovative technologies and expanded services. ¹⁴⁴

¹³⁸Communications Act, § 623(b)(1), 47 U.S.C. § 543(b)(3).

¹³⁹*Id.*

¹⁴⁰See 47 C.F.R. § 76.923(a).

¹⁴¹Communications Act, § 623(a), 47 U.S.C. § 543(a).

¹⁴²1992 Conference Report at 63.

¹⁴³1996 Conference Report at 1.

¹⁴⁴See, e.g., Ameritech Reply Comments at 6.

62. We believe that the above provisions authorize the Commission not only to establish regulations duplicating the behavior of a competitive market, but to take actions that prompt the evolution of a true competitive environment. Based on the record before us,¹⁴⁵ we find that failing to establish such procedures would continue existing barriers to competitive choice for individuals residing in MDUs. Individuals residing in MDUs often are currently limited to receiving service from only one provider. Although we recognize that subscriber choice would be enhanced by the use of multiple wires, we do not believe that requiring MDU owners to permit multiple wires is a viable option at this point in time.¹⁴⁶ We believe that the inability of the MDU owner to use the existing home run wiring deters consideration of alternative providers, and that providing certainty with regard to the disposition of the MDU home run wiring provides a reasonable means of increasing choice and promoting competition.

63. We also conclude that, in accordance with the second part of Section 4(i), the procedural mechanisms we are proposing are not inconsistent with any provision of the law. Nothing in the language of Section 624(i) prohibits the Commission from adopting rules concerning wiring outside the subscriber's premises.¹⁴⁷ This is not a circumstance where the general canon of statutory construction, the "specific governs the general,"¹⁴⁸ applies. The courts have found this canon applicable only where there "is an 'inescapable conflict' between the specific provision and the general provision."¹⁴⁹ Section 624(i) does not expressly prohibit the Commission from adopting rules affecting home run wiring. Thus, we tentatively conclude that there is no "inescapable conflict" between Section 624(i) and the procedures discussed below.¹⁵⁰ To the contrary, as described above, we believe that the rules we are proposing will further promote Section 624(i)'s underlying purpose of promoting consumer choice and competition by permitting subscribers to use their existing home wiring to receive an alternative video programming service. Finally, as the *Mtel* court found, the *expressio unius maxim* -- that the expression of one is the exclusion of other -- "'has little force in the administrative setting,' where we defer to an agency's interpretation of a statute unless Congress has "'directly spoken to the precise question at issue."¹⁵¹

¹⁴⁵See Section III.A. above.

¹⁴⁶See *id.*

¹⁴⁷This approach is consistent with assertions by certain parties that Section 624(i) should be read as the minimum, not maximum, level of authority the Commission may exercise over cable inside wiring. Media Access Project/CFA Comments at 12; Bartholdi Reply Comments at 4-5; ICTA Reply Comments at 8.

¹⁴⁸See, e.g., *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992).

¹⁴⁹*Aeron Marine Shipping Co. v. United States*, 695 F.2d 567, 576 (D.C. Cir. 1982).

¹⁵⁰See, e.g., *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101, 1107 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (the "wide-ranging source of authority" found in Section 4(i) adequately supports the Commission's orders requiring refunds as a result of rate reductions, despite the fact that the only provision of the Act that mentions refunds does not apply to the circumstance of the case).

¹⁵¹*Mtel*, 77 F.3d at 1404-05 (citing *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (quoting *Chevron v. NRDC*, 467 U.S. 837 (1984))).

Indeed, the *Mtel* court stated: "[W]e think the nature of Congress's auction authorization more supports than undermines the Commission's decision here."¹⁵²

64. While the legislative history of Section 624(i) indicates that Congress was concerned about the potential for theft of service¹⁵³ and signal leakage,¹⁵⁴ we believe that the rules we are proposing would not have an adverse impact on those concerns. First, we do not believe that the procedural mechanisms we are proposing will increase the frequency of service theft; a provider's control over its network security is unaffected by our rules. Our proposed rules do not give the MDU owner, the alternative service provider or the subscriber access to the incumbent's riser cable or lockbox. Second, our proposed rules would not affect the service provider's signal leakage responsibilities. It would remain the duty of the provider to protect against signal leakage while it is providing service, regardless of who owns the home run wiring in the building.¹⁵⁵

65. We also think that cable operator reliance on the "Joint Use" provision of the 1996 Act (codified at Section 652(d)(2) of the Communications Act) as evidence of Congress' intent that cable operators retain ownership and control of the home run wiring is misplaced. Section 652(d)(2) provides generally that a LEC may obtain permission from the cable operator to use that part of the transmission facilities extending from the last multi-user terminal to the premises of the end user, and that such use must be reasonably limited in scope and duration.¹⁵⁶ Cable operators assert that this provision invests them with ownership and control of all cable wiring outside the subscriber demarcation point, including the home run wiring, even after a subscriber terminates service, as Congress otherwise would not have established rules allowing cable operators to set the terms and conditions for a LEC's use of the facilities.¹⁵⁷

66. We disagree. Notably, Section 652(d)(2) is entitled "Joint Use," indicating Congress' intent for the provision to govern only the joint use of the facilities by a cable operator and a local exchange carrier. It is an exception to the general prohibition in Section 652(c) on joint ventures or partnerships between cable operators and LECs that serve the same market area. We believe that Section 652(d)(2) does not constrain our authority to establish procedures governing the disposition of the home run wiring because the provision only addresses use of the wiring while the cable operator continues to own or use the facilities. Here, the procedural mechanisms would not apply until the cable operator has

¹⁵²*Mtel*, 77 F.3d at 1405 (quoting *Texas Rural Legal Aid*, 940 F.2d at 694 ("[A] congressional prohibition of particular conduct may actually *support* the view that the administrative entity can exercise its authority to eliminate a similar danger.") (emphasis in original)).

¹⁵³The 1992 House Report states: "The Committee is concerned about the potential for theft of service within apartment buildings. Therefore, this section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit." 1992 House Report at 118.

¹⁵⁴*Id.*

¹⁵⁵47 C.F.R. § 76.601, *et seq.*

¹⁵⁶47 U.S.C. § 572(d)(2).

¹⁵⁷*See, e.g.*, NCTA Comments at 10-11; Time Warner Comments at 16; CATA Comments at 4.

no legally enforceable right to remain on the premises and the MDU owner and/or subscriber terminates the operator's service.

67. Additionally, we believe that had Congress intended the "Joint Use" provision to govern cable wiring, it would have placed the provision in Section 624, which sets forth the existing wiring provisions, rather than in Section 652, which concerns telephone company-cable television cross-ownership restrictions. We also agree with alternative video service providers that Congress would have enumerated additional types of potential users of cable operators' wiring, other than telephone companies, if it had intended this provision to cover uses of the wiring other than the limited situation of wiring being shared between a LEC and a cable operator.¹⁵⁸

68. We believe that we have authority to apply all our cable inside wiring rules to all MVPDs, and not just to cable operators. Section 303(r) of the Communications Act authorizes the Commission, as required by public convenience, interest, or necessity, to promulgate rules and restrictions, not inconsistent with law, as may be necessary to carry out the provisions of the Act.¹⁵⁹ We believe that applying these rules to over-the-air video service providers would be in the public interest. The same competitive concerns described above exist regardless of whether a cable operator or some other video service provider initially installed a subscriber's or an MDU's inside wiring. In addition, we believe that applying our cable home wiring rules to MVPDs that are radio licensees would not be inconsistent with Section 624(i) and would further its purposes, since subscribers could use their existing inside wiring to receive an alternative service. Further, for similar reasons to those discussed above in proposing procedures for disposition of the home run wiring in MDUs for cable operators, such procedures would not be inconsistent with Section 624(i) if applied to MVPDs that are radio licensees.

69. In addition, we tentatively conclude that we have the authority under Sections 201 to 205 of the Communications Act to extend our cable inside wiring rules to common carriers engaged in the transmission of video programming.¹⁶⁰ We tentatively conclude that Section 4(i) also invests the Commission with authority to expand our rules in this manner with regard to MVPDs that are neither radio licensees nor common carriers. Again, we tentatively conclude that the same competitive concerns are present regardless of the type of service provider that initially installs the broadband inside wiring. In addition, we tentatively conclude that such an extension of our rules is necessary in the execution of our functions and is not inconsistent with the Communications Act, as described above. To promote parity among broadband competitors and to fulfill the directives of the 1992 Cable Act and the 1996 Act, we propose to apply our cable inside wiring rules to all MVPDs.

7. Constitutional Arguments

a. Background

70. As with the statutory authority issue, most commenters raised constitutional arguments in the context of a proposal to move the cable demarcation point. Generally, cable operators contend that

¹⁵⁸See, e.g., Bartholdi Reply Comments at 10-11.

¹⁵⁹See Communications Act, § 303(r), 47 U.S.C. § 303(r).

¹⁶⁰See 47 U.S.C. §§ 201-205.

moving the cable demarcation point would constitute a taking under the Fifth and Fourteenth amendments to the U.S. Constitution.¹⁶¹ According to Cox and other cable operators, because the Communications Act limits the Commission's authority over cable wiring to wiring "within the premises of the subscriber," the Commission may not effectuate a taking of the home run wiring.¹⁶² In addition, cable operators assert that "simply adopting a 'just compensation' formula is not the answer here."¹⁶³ NCTA argues that the Commission cannot provide for adequate compensation to a cable operator for the "lost opportunity costs resulting from this unlawful seizure."¹⁶⁴ Paying the cable operator for the "replacement cost" of the wiring would not compensate the operator for its lost opportunity to compete in the provision of telecommunications services, and would contradict the policy of fostering facilities-based competition.¹⁶⁵

71. Alternative service providers state that the Commission has already rejected the cable operators' takings argument with respect to the wiring within the individual subscriber's unit, and that moving the demarcation point farther from the individual dwelling unit is irrelevant to any further takings analysis.¹⁶⁶ Alternative service providers also state that relocating the demarcation point would not be an impermissible taking because the cable operator always has the right and opportunity to remove the wiring before it is forfeited and the cable operator would be compensated for its wiring.¹⁶⁷ Alternative service providers also dispute the cable operators' claim that "just compensation" must include lost opportunity costs, arguing that any lost opportunities arise from the subscriber's decision to terminate the cable operator's service, not as a matter of law.¹⁶⁸ In addition, these parties state that cable operators typically installed the wiring many years earlier, and have more than fully recouped their investment.

¹⁶¹See, e.g., NCTA Comments at 36 (citing *Loretto v. Teleprompter Manhattan CATV Co.*, 458 U.S. 419 (1982)); see also NCTA Reply Comments at 11-13.

¹⁶²Cox Comments at 16-17 (citing *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994).

¹⁶³NCTA Comments at 36.

¹⁶⁴*Id.* NCTA adds that just compensation would have to be determined in an adjudicatory proceeding that is subject to judicial review. *Id.* (citing *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1546 (11th Cir. 1985), *rev'd on other grounds*, 480 U.S. 245 (1987)); see also CATA Reply Comments at 3.

¹⁶⁵*Id.*; see also Time Warner Comments at 20-21; CATA Comments at 6-8; Continental/Cablevision Comments at 12 n.19; TKR Comments at 4; Joint Cable Parties Reply Comments at 20-22.

¹⁶⁶See Bartholdi Reply Comments at 12 n.31 (citing *Cable Home Wiring Further Notice* at para. 9 and *Loretto*, 458 U.S. at 436-37 ("[C]onstitutional protection for the rights of private property [do not] depend on the size of the area permanently occupied.")).

¹⁶⁷See 47 C.F.R. § 76.802; Bartholdi Reply Comments at 12-13 (the cable home wiring rules "merely regulate the manner in which [cable] wiring is sold, removed, or abandoned upon voluntary termination of service").

¹⁶⁸WCA Comments at 20.

b. Discussion

72. We tentatively conclude that the procedural mechanisms we have proposed do not constitute an impermissible "taking" under the Fifth Amendment.¹⁶⁹ First, there is no forced taking of the incumbent's physical property, since the incumbent has a reasonable opportunity to remove, abandon, or sell the wiring. If the incumbent fails to act within the reasonable periods set forth and its wiring is deemed abandoned, it is the operator's failure to act, not the Commission's rule, that would extinguish the cable operator's rights.¹⁷⁰ The Fifth Amendment cannot be construed to allow a service provider with no contractual or other legal right to remain on a person's property to leave its wiring on the property indefinitely and prohibit the property owner from using it. In addition, there can be no taking of the incumbent's access rights because the procedures expressly apply only where the incumbent does not have a contractual, statutory or other legal right to maintain its wiring on the premises.¹⁷¹ We seek comment on these tentative conclusions.

D. Disposition of Cable Home Wiring

73. We believe that fostering competitive choice in MDUs requires the coordinated disposition of two segments of cable wiring: (1) the home run wiring from the point where the wiring becomes devoted to an individual unit to the cable demarcation point; and (2) the cable home wiring from the demarcation point to the subscriber's television set or other customer premises equipment. Without clear and predictable rules for the disposition of each of these segments, an alternative provider's ability to convince an MDU owner or individual subscriber to switch services could be significantly compromised. The procedural framework proposed above addressed the disposition of MDU home run wiring. Here, we set forth a specific proposal on how to address certain issues regarding the disposition of MDU cable home wiring. We believe that these rules will promote competition and consumer choice by providing a comprehensive and workable framework for the disposition of MDU cable wiring.

74. As in the context of home run wiring, we propose that these home wiring procedural mechanisms apply regardless of the identity of the incumbent video service provider involved. While initially this incumbent would commonly be a cable operator, it could also be a SMATV provider, an MMDS provider, a DBS provider or others. We tentatively conclude that we have the same authority to apply these home wiring rules to other video service providers described in Section III.C.6. above. We request comment on this proposal.

¹⁶⁹The Fifth Amendment provides that private property shall not be "taken for public use, without just compensation." U.S. Const. amend. V.

¹⁷⁰See *United States v. Locke*, 471 U.S. 84, 107 (1985) (rejecting Fifth Amendment taking claim where the plaintiff failed to comply with statutory requirement for filing mining claim that would have indicated its intent to retain property right); see also *Texaco v. Short*, 454 U.S. 516, 530 (1982) (noting that the Court has never required compensation to a private property owner who fails to take reasonable actions imposed by law for the consequences of his own neglect).

¹⁷¹See *Cable Investments, Inc. v. Woolley*, 867 F.2d 151 (3d Cir. 1989) (cable operator has no general right to access property against landlord's wishes).

1. Building-by-Building Disposition of Home Wiring

75. In the *Cable Home Wiring Further Notice*, we requested comment on, among other issues, whether, in order to promote the goals of Section 624(i) and our rules thereunder, the subscriber (on a non-loop-through wiring configuration) or the building owner (with a loop-through wiring configuration) should be given the opportunity to purchase the cable home wiring when the MDU owner terminates cable service for the entire building.¹⁷² For the most part, alternative service providers support having the cable home wiring procedures apply where the building owner terminates service on behalf of the entire building.¹⁷³ Some commenters believe that when the building owner terminates service the individual subscriber should be given the opportunity to purchase the home wiring;¹⁷⁴ others believe only the building owner should have that right.¹⁷⁵ GTE asserts that cable "subscriber" should be defined as the one that contracts or arranges for service.¹⁷⁶ Bell Atlantic contends that the building owner may be acting as the subscriber's authorized agent if the subscriber agrees in its lease agreement that the landlord may terminate service.¹⁷⁷ Building Owners, et al., oppose applying the Commission's rules under Section 624(i) when service for the entire building is terminated, allegedly because much of the building wiring is not cable home wiring and because a landlord is not a "subscriber" under the Commission's rules.¹⁷⁸

76. We tentatively conclude that, if the MDU owner has the legal right, either by law or by contract, to terminate the subscriber's cable service, the owner terminating service for the entire building is effectively voluntarily terminating service on the subscribers' behalf.¹⁷⁹ We therefore tentatively conclude that our home wiring rules would be triggered when an MDU owner terminates service for the

¹⁷²*Cable Home Wiring Further Notice*, 11 FCC Rcd at 4582.

¹⁷³Ameritech MM Docket No. 92-260 Comments at 8; Bell Atlantic MM Docket No. 92-260 Comments at 3; NYNEX MM Docket No. 92-260 Comments at 4. *But see* Building Owners, et al., MM Docket No. 92-260 Comments at 1; CATA MM Docket No. 92-260 Comments at 5.

¹⁷⁴New York City MM Docket No. 92-260 Comments at 7 (other than bulk arrangements, only subscribers should have the opportunity to purchase the home wiring); *see also* GTE MM Docket No. 92-260 Comments at 7 (Commission should deregulate wiring and give subscribers full control over home wiring).

¹⁷⁵ICTA MM Docket No. 92-260 Comments at 4 (building owner should have the right to purchase regardless of who terminates; requiring option to purchase only when tenant terminates is inconsistent with congressional intent); OpTel MM Docket No. 92-260 Comments at 8; PacTel MM Docket No. 92-260 Comments at 3 (owner should be given the right to purchase and occupant should be given the right to control, e.g., to choose video service providers). *But see* Building Owners, et al., MM Docket No. 92-260 Comments at 4-5 (Commission does not have authority over landlords because they are neither subscribers nor cable operators); Time Warner MM Docket No. 92-260 Reply Comments at 7-8.

¹⁷⁶GTE MM Docket No. 92-260 Comments at 7. *But see* Building Owners, et al., MM Docket No. 92-260 Comments at 4-5 (landlord is not a subscriber as defined in 47 C.F.R. § 76.5(ee)).

¹⁷⁷Bell Atlantic MM Docket No. 92-260 Comments at n.3.

¹⁷⁸Building Owners, et al., MM Docket No. 92-260 Comments at 4-5.

¹⁷⁹*See* Bell Atlantic MM Docket No. 92-260 Comments at n.3.

entire building. We tentatively conclude that providing the cable operator a single point of contact (i.e., the MDU owner) would further the statutory purposes of minimizing disruption and facilitating the transfer of service to a competing video service provider. Because we believe that it would be impractical and inefficient for the incumbent provider to deal with each individual subscriber regarding the disposition of his or her cable home wiring when the entire MDU is switching providers, we propose to deem the MDU owner to be acting as the terminating "subscriber" for purposes of the disposition of the cable home wiring within the individual dwelling unit where the cable home wiring is not already owned by a resident. We request comment on this proposal. Similarly, with regard to bulk service contracts, we tentatively conclude that it is logical for the landlord to be deemed the subscriber, and thus for the landlord to have the right to purchase the wiring as provided in our general rules. We tentatively conclude, however, that this rule should not override a bulk service contract that specifically provides for the disposition of the wiring upon termination of the contract.

77. We propose that, when an MDU owner provides an incumbent provider with its minimum of 90 days notice that the incumbent provider's access to the entire building will be terminated and that the MDU owner seeks to use the home run wiring for another service, the incumbent provider must, in accordance with our current home wiring rules, (1) offer to sell to the MDU owner any home wiring within the individual dwelling units which the incumbent provider owns and intends to remove, and (2) provide the MDU owner with the total per-foot replacement cost of such home wiring.¹⁸⁰ As with the home run wiring, if the MDU owner declines to purchase the cable home wiring not already owned by a resident, the alternative service provider could elect to purchase it upon service termination under our rules.

78. We propose to require that the MDU owner decide whether it or the alternative provider will purchase the cable home wiring and so notify the incumbent provider no later than 30 days before the termination of access to the building will become effective. We propose to modify our current home wiring rules to allow the incumbent provider 30 days, rather than the current seven, to remove all of the cable home wiring for the entire building. We believe this is appropriate given the amount of home wiring that may need to be removed from an entire building. We propose that, if the MDU owner and the alternative service provider decline to purchase the home wiring, the incumbent provider would not be permitted to remove the home wiring until the date of actual service termination, i.e., likely 90 days after the building owner notified the incumbent that its access to the entire building will be terminated. Under these circumstances, we would propose that if the incumbent provider fails to remove the home wiring within 30 days of actual service termination, it could make no subsequent attempt to remove the wiring or restrict its use. We request comment on this proposal.

2. Unit-by-Unit Disposition of Home Wiring

79. In the unit-by-unit context, we propose to continue to apply our rules permitting terminating subscribers (or their agents) to purchase the cable home wiring up to a point approximately 12 inches outside their individual units.¹⁸¹ We continue to believe that this is consistent with the purposes

¹⁸⁰See 47 C.F.R. § 76.802.

¹⁸¹Our current rules require a cable operator, if the operator owns the wiring and intends to remove it, to give a terminating subscriber an opportunity to purchase the wiring on the subscriber's side of the demarcation point (at or about 12 inches outside the customer's premises). If the subscriber declines to acquire the wiring, the operator

of Section 624(i) to promote consumer choice and competition by permitting subscribers to avoid the disruption of having their home wiring removed upon voluntary termination and to subsequently utilize that wiring for an alternative service.¹⁸² We do, however, propose to modify our rules in two ways. First, as discussed below, we propose to permit the MDU owner or the alternative service provider to purchase the cable home wiring within each unit if the subscriber declines, provided that the building owner timely notifies the incumbent provider that it or the alternative provider wants to purchase the home wiring whenever a subscriber declines. Second, we propose to change the time in which an incumbent provider must remove the home wiring or make no further effort to use it or restrict its use from seven business days to seven calendar days after the individual subscriber terminates service. We believe that this minor change is sufficient time for removal of a single unit's cable home wiring, and will avoid customer confusion by having the time permitted for the provider to remove the home wiring within the individual unit run concurrently with the time permitted for the provider to remove, sell or abandon the home run wiring outside the unit.

80. In the *Cable Home Wiring Further Notice*, we requested comment on whether the premises owner should have the right to purchase the cable home wiring when a subscriber who voluntarily terminates cable service does not own the premises and elects not to purchase the wiring.¹⁸³ Alternative service providers contend that the premises owner should have the right to purchase the cable home wiring when the individual subscriber declines to purchase it, if not at all times.¹⁸⁴ ICTA claims that this arrangement would promote competition and, consistent with Section 624(i), would avoid damage, cost and inconvenience to the owner's property.¹⁸⁵ Building Owners, et al., claim that only owner residents (as opposed to tenants) should have the right to purchase cable home wiring in the first place.¹⁸⁶ According to Building Owners, et al., apartment residents are transient and do not have a long term financial interest in the property.¹⁸⁷ In addition, Building Owners, et al., contend that it is essential for

must remove it within seven business days or make no subsequent attempt to remove it or restrict its use. See 47 C.F.R. § 76.802(a).

¹⁸²See 1992 House Report at 118; 1992 Senate Report at 23; see also *Cable Home Wiring Further Notice*, 11 FCC Rcd at 4570 (citing *Cable Wiring Order*, 8 FCC Rcd at 1435).

¹⁸³*Cable Home Wiring Further Notice*, 11 FCC Rcd at 4583.

¹⁸⁴Ameritech MM Docket No. 92-260 Comments at 9; Bell Atlantic MM Docket No. 92-260 Comments at 2-3; ICTA MM Docket No. 92-260 Comments at 5 (premises owner should always have the right to purchase, not only if subscriber declines); OpTel MM Docket No. 92-260 Comments at 2, 7-8 (because owner has long term investment in building and services available to it, owner should always be allowed to purchase wiring when subscriber is merely renting); PacTel MM Docket No. 92-260 Comments at 4 (building owner should have the right to purchase while tenant should have the right to use); see also New York City MM Docket No. 92-260 Comments at 8.

¹⁸⁵ICTA MM Docket No. 92-260 Comments at 5; see also Ameritech MM Docket No. 92-260 Reply Comments at 8-9.

¹⁸⁶Building Owners, et al., MM Docket No. 92-260 Comments at 6, 8, 18-19 (Commission's home wiring rules should not apply to apartment or cooperative residents; current rules adequately address condominium situation because condominium owners should be treated like single dwelling unit owners).

¹⁸⁷*Id.* at 7; see also OpTel MM Docket No. 92-260 Comments at 2, 7-8.

the building owner to have full control over its property, including the wiring, subject only to state property law, a lease or other contract.¹⁸⁸ Time Warner claims that Congress did not confer benefits or opportunities on landlords.¹⁸⁹ NCTA asserts that the wiring should be available to subsequent residents unless the operator removes the wiring.¹⁹⁰

81. We tentatively conclude that an MDU owner should be permitted to purchase the wiring within an individual dwelling unit based on the per-foot replacement cost¹⁹¹ if the individual subscriber declines to do so. This approach would preserve the current subscriber's rights, and still allow the building owner to act on behalf of future tenants, thus promoting competition and consumer choice. As with the home run wiring, if the MDU owner declines to purchase the cable home wiring, the alternative service provider would be permitted to purchase it. Except with respect to the building-by-building procedure described above, we would not require that the building owner or the alternative provider have the opportunity to purchase the wiring before the subscriber has the opportunity to do so because we believe that Congress intended for Section 624(i) to promote individual subscriber choice whenever possible. Our preference is therefore for the subscriber to control its own home wiring, and only when that is not reasonable or efficient, for the building owner or alternative provider to control it.

82. We propose that the MDU owner should notify the incumbent provider of its election to purchase or to allow the alternative provider to purchase the home wiring at the same time as the MDU owner provides the incumbent provider with 60 days notice that it intends to allow head-to-head competition within its building. Thus, the MDU owner would be required to inform the incumbent provider one time for the entire building. If the MDU owner fails to provide the incumbent with such notice, the incumbent would be under no obligation to sell the home wiring to the MDU owner or the alternative provider when an individual subscriber terminates and declines to purchase the wiring. We request comment on this proposal.

E. Alternatives to Procedural Framework

83. Recently, RCN argued that some MDU owners do not object to a second set of home run wires but to the installation of a second set of hallway molding or conduits.¹⁹² RCN asserts that in some cases there is room in the molding or conduit for it to install its home run wiring without interfering with the incumbent's wiring.¹⁹³ We propose to permit the alternative service provider to install its wiring

¹⁸⁸Building Owners, et al., MM Docket No. 92-260 Comments at 6-7, 9; *see also id.* at 10-11 (only building owner or service provider should own the wiring).

¹⁸⁹Time Warner MM Docket No. 92-260 Comments at 6-7.

¹⁹⁰NCTA MM Docket No. 92-260 Comments at 5.

¹⁹¹*See* 47 C.F.R. § 76.802.

¹⁹²*See* Ex Parte Letter from Jean L. Kiddoo, Swidler & Berlin, on behalf of RCN, to William F. Caton, Acting Secretary, Federal Communications Commission (July 18, 1997) ("RCN Ex Parte Letter").

¹⁹³*Id.* RCN proposes that, if space is not available in the conduit/molding, and the demarcation point is otherwise inaccessible, the incumbent provider occupying space needed by another provider to serve a subscriber must elect to sell, remove or abandon unused drops.

within the existing molding or conduit, even over the incumbent provider's objection, where there is room in the molding or conduit and the MDU owner does not object. We seek comment on whether and how to allow compensation for the alternative service provider's use of the molding or conduit. We tentatively conclude that such a rule would promote competition and consumer choice and would not constitute a taking of the incumbent provider's private property without just compensation under the Fifth Amendment. We seek comment on these tentative conclusions. We also seek comment on whether and how this rule would apply in the situation where an incumbent provider has an exclusive contractual right to occupy the molding or conduit.

84. Several commenters also point out that the current cable demarcation point can be physically inaccessible. We tentatively conclude that where the cable demarcation point is truly physically inaccessible to an alternative service provider (e.g., embedded in brick, metal conduit or cinder blocks, not simply within hallway molding), the demarcation point should be moved back to the point at which it first becomes physically accessible. We seek comment on this tentative conclusion and on how to define "physically inaccessible." We also seek comment on the percentage of installations in which the demarcation point would be deemed physically inaccessible. Finally, we seek comment on our authority to adopt, and any other legal implications of, this proposed modification.

85. We also seek comment on whether we should adopt a rule requiring video service providers to transfer to the MDU owner upon installation ownership of the home wiring and home run wiring installed in MDUs under contracts entered into on or after the effective date of any rules we may adopt. Such a rule might increase competition and consumer choice in future installations by permitting MDU owners to control access to the home run wiring from the start. We seek comment on the appropriate mechanism for effecting such a transfer, whether the price for the wiring should be regulated or left to private negotiations, and whether and how our rules should address the issue of an MDU owner that does not want to own the home run wiring in its building. In addition, we seek comment on our authority to adopt, and any other legal implications of, such a rule.

86. Finally, we seek comment on any other proposals to promote MVPD competition and consumer choice in MDUs that have not already been previously raised and commented on in the *Inside Wiring Notice* and the *Cable Home Wiring Further Notice*. In particular, we ask commenters to address the legal, policy and practical implications of any such proposals.

IV. INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS

87. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603, ("RFA"), the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the expected significant impact on small entities by the policies and rules proposed in this *Further Notice of Proposed Rulemaking*. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing procedures as other comments in this proceeding, but they must have a separate and distinct heading designating them as responses to the IRFA. The Secretary shall send a copy of the *Further Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the RFA. In addition, the *Further Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.

Need for Action and Objectives of the Proposed Rules

88. This *Further Notice* proposes to supplement the cable home wiring rules with new procedural mechanisms to provide certainty regarding the use of MDU home run wiring upon termination of existing service. In addition, we propose to expand our cable inside wiring rules to apply to all MVPDs in order to promote parity among competitors.

Legal Basis

89. This *Further Notice* is adopted pursuant to Sections 1, 4(i), 201-205, 303, 623, 624, and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 303, 543, 544 and 552.

Description and Estimate of the Number of Small Entities Impacted

90. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the proposed rules.¹⁹⁴ The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction," and the same meaning as the term "small business concern" under Section 3 of the Small Business Act.¹⁹⁵ Under the Small Business Act, a "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration ("SBA").¹⁹⁶ The rules we propose in this *Further Notice* will affect MVPDs and MDU owners.

91. *Small MVPDs*: SBA has developed a definition of a small entity for cable and other pay television services, which includes all such companies generating \$11 million or less in annual receipts.¹⁹⁷ This definition includes cable system operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems and subscription television services. According to the Bureau of the Census, there were 1423 such cable and other pay television services generating less than \$11 million in revenue that were in operation for at least one year at the end of 1992.¹⁹⁸ We will address each service individually to provide a more succinct estimate of small entities.

92. *Cable Systems*: The Commission has developed its own definition of a small cable company for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is

¹⁹⁴5 U.S.C. § 604(a)(3).

¹⁹⁵5 U.S.C. § 601(3).

¹⁹⁶15 U.S.C. § 632.

¹⁹⁷13 C.F.R. § 121.201 (SIC 4841).

¹⁹⁸1992 Economic Census Industry and Enterprise Receipts Size Report, Table 2D, SIC 4841 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

one serving fewer than 400,000 subscribers nationwide.¹⁹⁹ Based on our most recent information, we estimate that there were 1439 cable operators that qualified as small cable companies at the end of 1995.²⁰⁰ Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1439 small entity cable system operators that may be affected by the decisions and rules proposed in this *Further Notice*.

93. The Communications Act also contains a definition of a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²⁰¹ The Commission has determined that there are 61,700,000 subscribers in the United States. Therefore, we found that an operator serving fewer than 617,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed \$250 million in the aggregate.²⁰² Based on available data, we find that the number of cable operators serving 617,000 subscribers or less totals 1450.²⁰³ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

94. *MMDS*: The Commission refined the definition of "small entity" for the auction of MMDS as an entity that together with its affiliates has average gross annual revenues that are not more than \$40 million for the preceding three calendar years.²⁰⁴ This definition of a small entity in the context of the Commission's *Report and Order* concerning MMDS auctions has been approved by the SBA.²⁰⁵

95. The Commission completed its MMDS auction in March 1996 for authorizations in 493 basic trading areas ("BTAs"). Of 67 winning bidders, 61 qualified as small entities. Five bidders indicated that they were minority-owned and four winners indicated that they were women-owned businesses. MMDS is an especially competitive service, with approximately 1573 previously authorized and proposed MMDS facilities. Information available to us indicates that no MMDS facility generates revenue in excess of \$11 million annually. We tentatively conclude that there are approximately 1634 small MMDS providers as defined by the SBA and the Commission's auction rules.

¹⁹⁹47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of \$100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215, 10 FCC Rcd 7393 (1995).

²⁰⁰Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

²⁰¹47 U.S.C. § 543(m)(2).

²⁰²47 C.F.R. § 76.1403(b).

²⁰³Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

²⁰⁴47 C.F.R. § 21.961(b)(1).

²⁰⁵See *Report and Order*, MM Docket No. 94-31 and PP Docket No. 93-253, 10 FCC Rcd 9589 (1995).

96. *ITFS*: There are presently 1,989 licensed educational ITFS stations and 97 licensed commercial ITFS stations. Educational institutions are included in the definition of a small business.²⁰⁶ However, we do not collect annual revenue data for ITFS licensees and are unable to ascertain how many of the 97 commercial stations would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,989 ITFS licensees are small businesses.

97. *DBS*: There are presently nine DBS licensees, some of which are not currently in operation. The Commission does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. Although DBS service requires a great investment of capital for operation, we acknowledge that there are several new entrants in this field that may not yet have generated \$11 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

98. *HSD*: The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other multichannel video service providers. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by video service providers, of which 115 channels are scrambled and approximately 150 are unscrambled.²⁰⁷ HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming packager. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other video service providers; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.²⁰⁸

99. According to the most recently available information, there are approximately 30 program packagers nationwide offering packages of scrambled programming to retail consumers.²⁰⁹ These program packagers provide subscriptions to approximately 2,314,900 subscribers nationwide.²¹⁰ This is an average of about 77,163 subscribers per program packager. This is substantially smaller than the 400,000 subscribers used in the Commission's definition of a small MSO. Furthermore, because this an average, it is likely that some program packagers may be substantially smaller.

100. *OVS*: The Commission has certified nine open video system ("OVS") operators. Because these services were introduced so recently and only one operator is currently offering programming to our

²⁰⁶SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601(5).

²⁰⁷1996 Competition Report, FCC 96-496 at para. 49.

²⁰⁸*Id.*

²⁰⁹*Id.*

²¹⁰*Id.*

knowledge, little financial information is available. Bell Atlantic (certified for operation in Dover) and Metropolitan Fiber Systems ("MFS," certified for operation in Boston and New York) have sufficient revenues to assure us that they do not qualify as small business entities. Two other operators, Residential Communications Network ("RCN," certified for operation in New York) and RCN/BETG (certified for operation in Boston), are MFS affiliates and thus also fail to qualify as small business concerns. However, Digital Broadcasting Open Video Systems (a general partnership certified for operation in southern California), Urban Communications Transport Corp. (a corporation certified for operation in New York and Westchester), and Microwave Satellite Technologies, Inc. (a corporation owned solely by Frank T. Matarazzo and certified for operation in New York) are either just beginning or have not yet started operations. Accordingly, we tentatively conclude that three OVS licensees may qualify as small business concerns.

101. *SMATVs*: Industry sources estimate that approximately 5200 SMATV operators were providing service as of December 1995.²¹¹ Other estimates indicate that SMATV operators serve approximately 1.05 million residential subscribers as of September 1996.²¹² The ten largest SMATV operators together pass 815,740 units.²¹³ If we assume that these SMATV operators serve 50% of the units passed, the ten largest SMATV operators serve approximately 40% of the total number of SMATV subscribers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we tentatively conclude that a substantial number of SMATV operators qualify as small entities.

102. *LMDS*: Unlike the above pay television services, LMDS technology and spectrum allocation will allow licensees to provide wireless telephony, data, and/or video services. An LMDS provider is not limited in the number of potential applications that will be available for this service. Therefore, the definition of a small LMDS entity may be applicable to both cable and other pay television (SIC 4841) and/or radiotelephone communications companies (SIC 4812). The SBA definition for cable and other pay services is defined above. A small radiotelephone entity is one with 1500 employees or less.²¹⁴ For the purposes of this proceeding, we include only an estimate of LMDS video service providers. The vast majority of LMDS entities providing video distribution could be small businesses under the SBA's definition of cable and pay television (SIC 4841). However, in the *LMDS Second Report and Order*, we defined a small LMDS provider as an entity that, together with affiliates and attributable investors, has average gross revenues for the three preceding calendar years of less than \$40 million.²¹⁵ We have not yet received approval by the SBA for this definition.

²¹¹1996 Competition Report FCC 96-496 at para. 81.

²¹²*Id.*

²¹³*Id.*

²¹⁴13 C.F.R. § 121.201.

²¹⁵*Second Report and Order*, CC Docket No. 92-297, FCC 97-82 (released March 13, 1997) ("*LMDS Second Report and Order*").

103. There is only one company, CellularVision, that is currently providing LMDS video services. Although the Commission does not collect data on annual receipts, we assume that CellularVision is a small business under both the SBA definition and our proposed auction rules. We tentatively conclude that a majority of the potential LMDS licensees will be small entities, as that term is defined by the SBA.

104. *MDU Operators*: The SBA has developed definitions of small entities for operators of nonresidential buildings, apartment buildings and dwellings other than apartment buildings, which include all such companies generating \$5 million or less in revenue annually.²¹⁶ According to the Census Bureau, there were 26,960 operators of nonresidential buildings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992.²¹⁷ Also according to the Census Bureau, there were 39,903 operators of apartment dwellings generating less than \$5 million in revenue that were in operation for at least one year at the end of 1992.²¹⁸ The Census Bureau provides no separate data regarding operators of dwellings other than apartment buildings, and we are unable at this time to estimate the number of such operators that would qualify as small entities.

Reporting, Recordkeeping, and Other Compliance Requirements

105. The *Further Notice* proposes rules to require that, upon termination of existing service, the MDU operator must provide the incumbent service provider with notice of termination of the incumbent's access to the building or of the owner's wish to permit head-to-head competition for individual home run wires. The MDU operator would have the option of either purchasing the wiring or allowing the alternative provider to purchase it. The incumbent service provider would be required to elect to sell, remove or abandon its home run wiring and would have to complete its sales negotiations or remove its wiring within the time schedule provided herein or be deemed to have abandoned its wiring. The Commission's inside wiring rules would also be expanded to apply to all MVPDs.

106. The *Further Notice* requests comment on the adoption of penalties for incumbent MVPDs that elect to remove their MDU home run wiring upon termination of service and then fail to do so. Incumbent providers may choose to maintain records to prove their compliance with the rules regarding disposition of home run wiring, but we do not believe that they will need additional professional skills to maintain such records and we propose no requirement for such recordkeeping.

107. The *Further Notice* proposes a rule requiring video service providers to transfer ownership of MDU home run wiring to the MDU owner upon installation. Video service providers may choose to maintain records of the home run wiring subject to such a rule, but we do not believe that they will need

²¹⁶13 C.F.R. § 121.601 (SIC 6512, SIC 6513, SIC 6514).

²¹⁷1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6512 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

²¹⁸1992 Economic Census of Financial, Insurance and Real Estate Industries, Establishment and Firm Size Report, Table 4, SIC 6513 (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration).

additional professional skills to maintain such records and we propose no requirement for such recordkeeping.

Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered: None. However, any significant alternatives presented in the comments will be considered.

Federal Rules That May Duplicate, Overlap, or Conflict with the Proposed Rules:

None.

V. PAPERWORK REDUCTION ACT OF 1995 ANALYSIS

108. The requirements proposed in this *Further Notice* have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and would impose new and modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the proposed information collection requirements contained in this *Further Notice*, as required by the 1995 Act. Public comments are due 60 days from date of publication of this *Further Notice* in the Federal Register. Comments should address: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

109. Written comments by the public on the proposed new and modified information collection requirements are due September 25, 1997. Comments should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, N.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov. For additional information on the proposed information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

VI. PROCEDURAL PROVISIONS

110. *Ex parte Rules - "Permit-but-Disclose" Proceeding.* This proceeding will be treated as a "permit-but-disclose" proceeding subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the rules. 47 C.F.R. § 1.1206(b), as revised. Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. See 47 C.F.R. § 1.1206(b)(2), as revised. Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

111. *Filing of Comments and Reply Comments.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before September 25, 1997, and reply comments on or before October 2, 1997.

To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments and reply comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, Federal Communications Commission, 1919 M Street NW, Washington DC 20554.

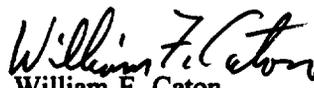
112. Written comments by the public on the proposed and/or modified information collections are due September 25, 1997. Written comments must be submitted by the Office of Management and Budget ("OMB") on the proposed and/or modified information collections on or before 60 days after date of publication in the Federal Register. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, NW, Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Timothy Fain, OMB Desk Officer, 10236 NEOB, 725 - 17th Street, NW, Washington, DC 20503 or via the Internet to fain_t@al.eop.gov.

VII. ORDERING CLAUSES

113. IT IS ORDERED that, pursuant to Sections 1, 4(i), 201-205, 303, 623, 624 and 632 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 303, 543, 544 and 552, NOTICE IS HEREBY GIVEN of proposed amendments to Part 76, in accordance with the proposals, discussions and statements of issues in this *Further Notice of Proposed Rulemaking*, and that COMMENT IS SOUGHT regarding such proposals, discussions and statements of issues.

114. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Further Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A**Parties That Filed Comments and Reply Comments
regarding the Issues Discussed in this Further Notice**

Note: If no abbreviation appears in parentheses following the full name, the full name is used in this *Further Notice*. Unless noted as being filed solely in MM Docket No. 92-260, all comments, reply comments and ex parte filings referred to in this *Further Notice* were filed in CS Docket No. 95-184.

Comments**CS Docket No. 95-184**

1st Lake Properties, Inc. ("1st Lake")
Adelphia Communications Corporation ("Adelphia")
Ameritech
AT&T Corp. ("AT&T")
Building Owners and Managers Association International, National Realty Committee,
National Multi Housing Council, National Apartment Association, Institute of
Real Estate Management, and National Association of Home Builders ("Building
Owners, et al.")
Cable Telecommunications Association ("CATA")
Charter Communications, Inc. and Comcast Cable Communications, Inc. ("Charter/Comcast")
Cincinnati Bell Telephone Company ("Cincinnati Bell")
Circuit City Stores, Inc. ("Circuit City")
Community Associations Institute
Continental Cablevision, Inc. and Cablevision Systems Corporation
("Continental/Cablevision")
Compaq Computer Corporation ("Compaq")
Consumer Electronics Manufacturers Association ("CEMA")
Cox Communications, Inc. ("Cox")
DIRECTV, Inc. ("DIRECTV")
GTE Service Corporation ("GTE")
Guam Cable TV
Independent Cable & Telecommunications Association ("ICTA")
Information Technology Industry Council ("ITI")
Marcus Cable Company, American Cable Entertainment, Greater Media, Inc., Cable
Television Association of Maryland, Delaware and the District of Columbia,
Cable Television Association of Georgia, Minnesota Cable Communications
Association, New Jersey Cable Telecommunications Association, Ohio Cable
Telecommunications Association, Oregon Cable Television Association,
South Carolina Cable Television Association, Tennessee Cable Television Association,
Texas Cable TV Association ("Joint Cable Parties")
Liberty Cable Company, Inc. ("Liberty")
MFS Communications Company, Inc. ("MFS")
Media Access Project and Consumer Federation of America ("Media Access/CFA")

Multimedia Development Corp. ("Multimedia Development")
MultiTechnologies Services, L.P. ("MultiTechnologies Services")
National Cable Television Association, Inc. ("NCTA")
NYNEX Telephone Companies ("NYNEX")
OpTel, Inc. ("OpTel")
Pacific Bell and Pacific Telesis Video Services ("PacTel")
People of the State of California and the Public Utilities Commission of the State of California ("California PUC")
RTE Group, Inc. ("RTE")
Real Estate Board on New York, Inc.
Residential Communications Network, Inc. ("RCN")
Riser Management Systems, L.P. ("Riser Mgmt.")
State of New Jersey Board of Public Utilities ("New Jersey BPU")
TKR Cable Company ("TKR")
Tandy Corporation ("Tandy")
Tele-Communications, Inc. ("TCI")
Telecommunications Industry Association, User Premises Equipment Division ("TIA")
Time Warner Cable and Time Warner Communications ("Time Warner")
U S West, Inc. ("U S West")
United States Telephone Association ("USTA")
Wireless Cable Association International, Inc. ("WCA")

MM Docket No. 92-260

Ameritech New Media, Inc. ("Ameritech")
Bell Atlantic Companies ("Bell Atlantic")
Building Owners and Managers Association International, National Realty Committee, National Multi Housing Council, National Apartment Association, Institute of Real Estate Management, and National Association of Home Builders ("Building Owners, et al.")
Cable Telecommunications Association ("CATA")
GTE Service Corporation ("GTE")
Independent Cable and Telecommunications Association ("ICTA")
National Cable Television Association, Inc. ("NCTA")
New York City Department of Information Technology and Telecommunications ("New York City")
NYNEX Telephone Companies ("NYNEX")
OpTel, Inc. ("OpTel")
Pacific Bell and Pacific Telesis Video Services ("PacTel")
Time Warner Cable ("Time Warner")

Reply Comments

CS Docket No. 95-184

Ameritech

AT&T Corp. ("AT&T")
Bartholdi Cable Company, Inc. ("Bartholdi")
Bell Atlantic Telephone Companies ("Bell Atlantic")
Building Owners and Managers Association International, National Realty Committee,
National Multi Housing Council, National Apartment Association, Institute
of Real Estate Management, National Association of Real Estate Investment
Trusts ("Building Owners, et al.")
Cable Telecommunications Association ("CATA")
Consumer Electronics Manufacturers Association ("CEMA")
Cablevision Systems Corporation and Continental Cablevision, Inc. ("Continental/Cablevision")
Cox Communication, Inc. ("Cox")
GTE Service Corporation ("GTE")
Independent Cable & Telecommunications Association ("ICTA")
Marcus Cable, Co., American Cable Entertainment, Greater Media, Inc., TCA Cable TV, Inc.,
Cable Television Association of Maryland, Delaware and the District of Columbia,
Cable Television Association of Georgia, Minnesota Cable Communications
Association, New Jersey Cable Telecommunications Association, Ohio Cable
Telecommunications Association, Oregon Cable Telecommunications Association,
South Carolina Cable Television Association, Tennessee Cable Television Association,
Texas Cable Telecommunications Association ("Joint Cable Parties")
OpTel, Inc. ("OpTel")
Time Warner Cable and Time Warner Communications Holdings, Inc. ("Time Warner")
United States Telephone Association ("USTA")
Wireless Cable Association International, Inc. ("WCA")

MM Docket No. 92-260

Ameritech New Media, Inc. ("Ameritech")

**APPENDIX B
BUILDING-BY-BUILDING DISPOSITION OF CABLE WIRING**

